



**BILLING CODES: 7535-01-P (20%); 6714-01-P (20%); 6210-01-P (20%); 4810-33-P (20%); 4810-AM-P (20%)**

## **FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL**

### **12 CFR Part 1101**

**[Docket No. FFIEC-2017-0002]**

#### **Description of Office, Procedures, and Public Information; Correction**

**AGENCY:** Federal Financial Institutions Examination Council (FFIEC).

**ACTION:** Interim final rule with request for comments; correcting amendments.

**SUMMARY:** The Federal Financial Institutions Examination Council (FFIEC or Council) is correcting an interim final rule announcing revisions and additions to its information disclosure regulations under the Freedom of Information Act (FOIA Regulations). This interim final rule replaces the interim final rule published in the Federal Register on December 27, 2016. The Council invites comments on this interim final rule revising its regulations implementing the Freedom of Information Act (FOIA). These revisions implement recent statutory amendments to the FOIA that are mandated by the FOIA Improvement Act of 2016, as well as update the language of the Council's regulations to more closely mirror the language of the FOIA and to reflect the Council's current FOIA procedures. This interim final rule also corrects three typographical errors that occurred when the Council's FOIA Regulations were last amended by a final rule appearing in the Federal Register on November 22, 2010.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit comments regarding this interim final rule, identified by “**Federal Financial Institutions Examination Council: Docket No. FFIEC-2017-0002**,” by any of the following methods:

- *Electronic submission of comments:* Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.
- *Facsimile:* (703) 562-6446.
- *Mail:* Ms. Judith Dupre, Executive Secretary, FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550.
- *Public Inspection of Comments:* In general, the Council will enter all comments received into the docket and publish them on the [www.regulations.gov](http://www.regulations.gov) website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Please be advised that your comments, including attachments and other supporting materials, are part of the public record and available for public inspection. Please do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. You may review comments and other related materials that pertain

to this notice of proposed rulemaking electronically by following the instructions at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Judith Dupre, Executive Secretary, Federal Financial Institutions Examination Council, via telephone: (703) 516-5590, or via e-mail: [JDupre@FDIC.gov](mailto:JDupre@FDIC.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Council<sup>1</sup> is publishing an interim final rule revising its information disclosure regulations under the Freedom of Information Act<sup>2</sup> (FOIA Regulations). On June 30, 2016, the Freedom of Information Act (FOIA) was amended by the FOIA Improvement Act of 2016<sup>3</sup> (FOIA Improvement Act). Among other things, section 3 of the FOIA Improvement Act required each Federal agency to revise its disclosure regulations and procedures for processing FOIA requests in order to conform to the substantive amendments made by section 2 of the FOIA Improvement Act by December 27, 2016. Accordingly, the Council is implementing the required substantive and procedural changes necessary to comply with the FOIA Improvement Act's amendments (such as changing the appeal deadline from 10 working days to 90 days and providing additional limitations on the fees charged by the Council). In addition, the Council is making certain changes to its FOIA Regulations to reflect revisions brought about by prior

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<sup>1</sup> The members of the Council are the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the State Liaison Committee.

<sup>2</sup> 5 U.S.C. 552.

<sup>3</sup> Public Law 114–185, 130 Stat. 538 (June 30, 2016).

amendments to the FOIA that were incorporated into the Council's procedures and to make the FOIA process easier for the public to navigate (such as providing an email address where administrative appeals may be submitted electronically). In drafting these amendments to the FOIA Regulations, the Council consulted the "Guidance for Agency FOIA Regulations" issued by the U.S. Department of Justice's Office for Information Policy.

The Council is also correcting technical and typographical errors that occurred when the Council's FOIA Regulations were last revised and published as a final rule in the *Federal Register* on November 22, 2010 (75 FR 71014). That publication resulted in the inadvertent duplication of two provisions in the Council's FOIA Regulations and the inadvertent omission of one provision. Accordingly, this interim final rule removes the duplicative provisions and reinserts the provision that was inadvertently deleted when the Council's FOIA Regulations were last amended in 2010. The following is a section-by-section discussion of the changes.

The Council initially published a final rule announcing the above changes on December 27, 2016 (81 FR 94937), and is hereby correcting that interim final rule to allow for a public comment period and to implement the changes set forth below.

## **II. Section-by-Section Analysis**

This interim final rule amends the Council's FOIA Regulations in 12 CFR 1101.4, as described below.

To implement the mandatory requirements made by the FOIA Improvement Act, the Council is revising § 1101.4(a) to clarify that the Council records available for public inspection pursuant to 5 U.S.C. 552(a)(2) include records released for a FOIA request three or more times or that are likely to become the subject of subsequent FOIA requests, and that such records will be made available in electronic format.

In accordance with the amendments made by the FOIA Improvement Act, the Council is also revising § 1101.4(b)(1) and (2) to reflect that information will only be withheld if the Council reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law, and to reflect that the deliberative process privilege only protects records that were created less than 25 years before the date when the records were requested.

In order to implement the recent amendments made by the FOIA Improvement Act and prior amendments to the FOIA, the Council is revising § 1101.4(b)(3)(v)(A) to provide that, whenever the Council extends the 20-day response time for a FOIA request by more than ten working days due to unusual circumstances, the Council's FOIA Public Liaison is available to assist the requester in modifying the scope of their FOIA request and that the requester may seek dispute resolution services from the Office of Government Information Services ("OGIS") or from the Council's FOIA Public Liaison.

The Council is revising § 1101.4(b)(3)(v)(B)(3) to provide that all determination letters from the Executive Secretary will advise requesters of their right to seek assistance from the Council's FOIA Public Liaison, which reflects a procedural change required by the FOIA Improvement Act.

To implement the FOIA Improvement Act's amendments to the FOIA with respect to appeals, the Council is revising § 1101.4(b)(3)(v)(B)(4) and (b)(3)(vi) to provide that, in the case of an adverse determination, requesters must be informed of the right to seek dispute resolution services from the Council's FOIA Public Liaison or OGIS, and that requesters have 90 days to file an administrative appeal (extended from the prior deadline of 10 working days). Relatedly, in order to mirror the more expansive language of the FOIA and to reflect the Council's current practice, the Council is updating the language in § 1101.4(b)(3)(v)(B)(4) and (b)(3)(vi) to clarify that a requester has the right to administratively appeal any "adverse determination" (not just to appeal the denial or partial denial of a request for records). The new language in paragraph (b)(3)(v)(B)(4) of this section also provides examples of the adverse determinations that may be appealed. In paragraph (b)(3)(vi) of this section, the Council is adding language to inform members of the public that they have the additional option to submit administrative appeals via e-mail and providing an e-mail address for members of the public to use to send such administrative appeals.

The Council is amending § 1101.4(b)(4)(i) to reflect that records will also be made available to requesters for public inspection in electronic format as required by the FOIA Improvement Act's amendments to the FOIA.

The FOIA Improvement Act's amendments to the FOIA restrict an agency's ability to charge search or duplication fees in certain circumstances. The Council is revising § 1101.4(b)(5)(ii) introductory text and (b)(5)(ii)(G) to reflect the statutory restrictions on charging fees.

In § 1101.4(b)(5)(ii)(E), the Council is replacing the words “Council personnel” with “the Council’s FOIA Public Liaison,” in order to identify a specific point of contact whom members of the public can contact.

The Council is also correcting three technical errors that occurred when the Council’s FOIA Regulations were revised in 2010. Section 1101.4(b)(5)(iii)(A) and (b)(5)(iv) were both amended as published in a final rule in the *Federal Register* on November 22, 2010 (75 FR 71014).<sup>4</sup> However, both the original version and the revised version of these paragraphs inadvertently remained in the final rule that appeared in the *Federal Register* on November 22, 2010 (75 FR 71014). Accordingly, the Council is deleting the first appearance of paragraph (b)(5)(iii)(A), deleting the second appearance of paragraph (b)(5)(iv), and making minor grammatical edits to the current paragraph (b)(5)(iii)(A). In addition, the Council is reinserting § 1101.4(b)(5)(v), which was inadvertently removed from the final rule that appeared in the *Federal Register* on November 22, 2010 (75 FR 71014) due to a publication error.

### **III. Request for Comments**

The Committee invites comment on all aspects of the interim final rule.

### **IV. Administrative Law Matters**

#### *A. Administrative Procedure Act*

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), notice and comment are not required prior to the issuance of a final rule if an agency, for good cause, finds that “notice and public procedure thereon are impracticable, unnecessary, or

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<sup>4</sup> The amendments to § 1101.4(b)(5)(iii)(A) and (b)(5)(iv) were subject to public notice and comment in the notice of proposed rulemaking that appeared in the *Federal Register* on September 3, 2010 (75 FR 54052).

contrary to the public interest.” As discussed above, this interim final rule implements the substantive amendments made by the FOIA Improvement Act. Congress provided Federal agencies with no discretion in amending their information disclosure regulations to comply with the statutory amendments made to the FOIA, and required that such conforming amendments become effective by December 27, 2016. Additionally, the three revisions fixing prior publishing errors are merely technical corrections to provisions that were already subject to public notice and the opportunity to comment. The other revisions bring the language of the Council’s FOIA Regulations into alignment with the more expansive language of the FOIA, reflect the Council’s current procedures, and provide the public with expanded benefits.

Given that the substantive amendments to the Council’s FOIA Regulations are mandated by the FOIA Improvement Act and were required to be implemented by December 27, 2016, and that the other amendments are technical in nature or expand the rights of the public, the Council for good cause finds that prior notice and comment on this rulemaking is impracticable, unnecessary, and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B). For these same reasons, the Council finds good cause to dispense with the 30-day delayed effective date otherwise required by 5 U.S.C. 553(d)(3). While the interim final rule is effective immediately upon publication, the Council is inviting public comment on the interim final rule during a 60-day period and will consider all comments in developing a final rule.

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies only to rules for which an agency publishes a general notice of proposed rulemaking. Because the



Council has determined for good cause that a notice of proposed rulemaking for this rule is unnecessary, the Regulatory Flexibility Act does not apply to this final rule. 5 U.S.C. 601(2).

#### *C. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is inapplicable because this interim final rule does not create any new, or revise any existing, information collection requirements under the Paperwork Reduction Act.

#### *D. Plain Language*

Section 722 of the Gramm-Leach-Bliley Act, Public. Law. 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all rules published after January 1, 2000. In light of this requirement, the Council has sought to present the interim final rule in a simple, comprehensible, and straightforward manner. The Council invites comment on whether the Council could take additional steps to make the rule easier to understand.

#### **List of Subjects in 12 CFR Part 1101**

FOIA exemptions, Freedom of information, Schedule of fees, Waivers or reductions of fees.

#### **Authority and Issuance**

For the reasons set forth in the preamble, the Council amends 12 CFR part 1101 as follows:

#### **PART 1101—DESCRIPTION OF OFFICE, PROCEDURES, PUBLIC INFORMATION**

1. The authority citation for part 1101 continues to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 3307.

2. Revise § 1101.4 to read as follows:

**§ 1101.4 Disclosure of information, policies, and records.**

(a) *Statements of policy published in the Federal Register or available for public inspection in an electronic format; indices.* (1) Under 5 U.S.C. 552(a)(1), the

Council publishes general rules, policies and interpretations in the *FEDERAL REGISTER*.

(2) Under 5 U.S.C. 552(a)(2), policies and interpretations adopted by the Council, including instructions to Council staff affecting members of the public are available for public inspection in an electronic format at the office of the Executive Secretary of the Council, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550, during regular business hours. Policies and interpretations of the Council may be withheld from disclosure under the principles stated in paragraph (b)(1) of this section.

(3) Copies of all records, regardless of form or format, are available for public inspection in an electronic format if they:

(i) Have been released to any person under paragraph (b) of this section;  
and

(ii)(A) Because of the nature of their subject matter, the Council determines that they have become or are likely to become the subject of subsequent requests for substantially the same records; or

(B) They have been requested three or more times.

- (4) An index of the records referred to in paragraphs (a)(1) through (3) of this section is available for public inspection in an electronic format.

*(b) Other records of the Council available to the public upon request; procedures—*

(1) *General rule and exemptions.* Under 5 U.S.C. 552(a)(3), all other records of the Council are available to the public upon request, except to the extent exempted from disclosure as provided in 5 U.S.C. 552(b) and described in this paragraph (b)(1), or if disclosure is prohibited by law. Unless specifically authorized by the Council, or as set forth in paragraph (b)(2) of this section, the following records, and portions thereof, are not available to the public:

- (i) A record, or portion thereof, which is specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which is, in fact, properly classified pursuant to such Executive Order.
- (ii) A record, or portion thereof, relating solely to the internal personnel rules and practices of an agency.
- (iii) A record, or portion thereof, specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), provided that such statute:
  - (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
  - (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

- (iv) A record, or portion thereof, containing trade secrets and commercial or financial information obtained from a person and privileged or confidential.
- (v) An intra-agency or interagency memorandum or letter that would not be routinely available by law to a private party in litigation, including, but not limited to, memoranda, reports, and other documents prepared by the personnel of the Council or its constituent agencies, and records of deliberations of the Council and discussions of meetings of the Council, any Council Committee, or Council staff, that are not subject to 5 U.S.C. 552b (the Government in the Sunshine Act). In applying this exemption, the Council will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date on which the records were requested.
- (vi) A personnel, medical, or similar record, including a financial record, or any portion thereof, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- (vii) Records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7), including records relating to a proceeding by a financial institution's State or Federal regulatory agency for the issuance of a cease-and-desist order, or order of suspension or removal, or assessment of a civil money penalty and the granting, withholding, or revocation of any approval, permission, or authority.

- (viii) A record, or portion thereof, containing, relating to, or derived from an examination, operating, or condition report prepared by, or on behalf of, or for the use of any State or Federal agency directly or indirectly responsible for the regulation or supervision of financial institutions.
- (ix) A record, or portion thereof, which contains or is related to geological and geophysical information and data, including maps, concerning wells.

(2) *Discretionary release of exempt information.* Notwithstanding the applicability of an exemption, the Council will only withhold records requested under this paragraph (b) if the Council reasonably foresees that disclosure would harm an interest protected by an exemption listed in 5 U.S.C. 552(b) and described in paragraph (b)(1) of this section. In addition, whenever the Council determines that full disclosure of a requested record is not possible, the Council will consider whether partial disclosure is possible and will take reasonable steps necessary to segregate and release the nonexempt portion of a record. The Council or the Council's designee may elect, under the circumstances of a particular request, to disclose all or a portion of any requested record where permitted by law. Such disclosure has no precedential significance.

(3) *Procedure for records request—(i) Initial request.* Requests for records shall be submitted in writing to the Executive Secretary of the Council:

- (A) By sending a letter to: FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550. Both

the mailing envelope and the request should be marked “Freedom of Information Request,” “FOIA Request,” or the like; or

(B) By facsimile clearly marked “Freedom of Information Act Request,” “FOIA Request,” or the like to the Executive Secretary at (703) 562-6446; or

(C) By e-mail to the address provided on the FFIEC's World Wide Web page, found at: <http://www.ffiec.gov>. Requests must reasonably describe the records sought.

(ii) *Contents of request.* All requests should contain the following information:

(A) The name and mailing address of the requester, an electronic mail address, if available, and the telephone number at which the requester may be reached during normal business hours;

(B) A statement as to whether the information is intended for commercial use, and whether the requester is an educational or noncommercial scientific institution, or news media representative; and

(C) A statement agreeing to pay all applicable fees, or a statement identifying any desired fee limitation, or a request for a waiver or reduction of fees that satisfies paragraph (b)(5)(ii)(H) of this section.

(iii) *Defective requests.* The Council need not accept or process a request that does not reasonably describe the records requested or that does not

otherwise comply with the requirements of this section. The Executive Secretary may return a defective request specifying the deficiency. The requester may submit a corrected request, which will be treated as an initial request.

- (iv) *Expedited processing.* (A) Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the Executive Secretary has determined to expedite the response, the Executive Secretary shall process the request as soon as practicable. To show a compelling need for expedited processing, the requester shall provide a statement demonstrating that:

- (1) Failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (2) The requester is primarily engaged in information dissemination as a main professional occupation or activity, and there is urgency to inform the public of the government activity involved in the request.

- (B) The requester's statement must be certified to be true and correct to the best of the person's knowledge and belief and explain in detail the basis for requesting expedited processing.
- (C) The formality of the certification required to obtain expedited treatment may be waived by the Executive Secretary as a matter of administrative discretion.

- (v) *Response to initial requests.* (A) Except where the Executive Secretary has determined to expedite the processing of a request, the Executive Secretary will respond by mail or electronic mail to all properly submitted initial requests within 20 working days of receipt. The time for response may be extended up to 10 additional working days in unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), where the Council has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. In addition, where the extension of the 20-day time limit exceeds 10 working days, as described by the FOIA, the requester shall be provided with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or provided an opportunity to arrange an alternative time frame for processing the request or a modified request. To aid the requester, the Council's FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Council. The Council's FOIA Public Liaison's contact information is available at <http://www.ffiec.gov/foia.htm>. The requester may also seek dispute resolution services from the Office of Government Information Services.
- (B) In response to a request that reasonably describes the records sought and otherwise satisfies the requirements of this section,



a search shall be conducted of records in existence and maintained by the Council on the date of receipt of the request, and a review made of any responsive information located. The Executive Secretary shall notify the requester of:

- (1) The Executive Secretary's determination of the response to the request;
- (2) The reasons for the determination;
- (3) The right of the requester to seek assistance from the Council's FOIA Public Liaison; and
- (4) When an adverse determination is made (including a determination that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; the requested record is not readily reproducible in the form or format sought by the requester; a fee waiver request or other fee categorization matter is denied; and a request for expedited processing is denied), the Executive Secretary will advise the requester in writing of that determination and will further advise the requester:
  - (i) If the denial is in part or in whole;

- (ii) The name and title of each person responsible for the denial (when other than the person signing the notification);
  - (iii) The exemptions relied on for the denial;
  - (iv) The right of the requester to appeal any adverse determination to the Chairman of the Council within 90 days following the date of issuance of the notification, as specified in paragraph (b)(3)(vi) of this section; and
  - (v) The right of the requester to seek dispute resolution services from the Council's FOIA Public Liaison or the Office of Government Information Services.
- (vi) *Appeals of responses to initial requests.* A requester may appeal any adverse determination in writing, within 90 days of the date of issuance of the adverse determination. Appeals should refer to the date and tracking number of the original request and the date of the Council's initial ruling. Appeals should include an explanation of the basis for the appeal. Appeals shall be submitted to the Chairman of the Council:
- (A) By sending a letter to: FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B-7081a, Arlington, VA, 22226-3550. Both the mailing envelope and the request should be marked "Freedom of Information Act Appeal," "FOIA Appeal," or the like; or

(B) By facsimile clearly marked “Freedom of Information Act Appeal,” “FOIA Appeal,” or the like to the Executive Secretary at (703) 562-6446; or

(C) By e-mail with the subject line marked “Freedom of Information Act Appeal,” “FOIA Appeal,” or the like to FOIA@ffiec.gov.

(vii) *Council response to appeals.* The Chairman of the Council, or another member designated by the Chairman, will respond to all properly submitted appeals within 20 working days of actual receipt of the appeal by the Executive Secretary. The time for response may be extended up to 10 additional working days, as provided in 5 U.S.C. 552(a)(6)(B), or for other periods by agreement between the requester and the Chairman or the Chairman’s designee.

(4) *Procedure for access to records if request is granted.* (i) When a request for access to records is granted, in whole or in part, a copy of the records to be disclosed will be promptly delivered to the requester or made available for inspection in an electronic format, whichever was requested. Inspection of records, or duplication and delivery of copies of records, will be arranged so as not to interfere with their use by the Council and other users of the records.

(ii) When delivery to the requester is to be made, copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the Executive Secretary deems it appropriate to send the documents by another means.

- (iii) The Council shall provide a copy of the record in any form or format requested if the record is readily reproducible by the Council in that form or format, but the Council need not provide more than one copy of any record to a requester.
  - (iv) By arrangement with the requester, the Executive Secretary may elect to send the responsive records electronically if a substantial portion of the records is in electronic format. If the information requested is subject to disclosure under the Privacy Act of 1974, 5 U.S.C. 552a, it will not be sent by electronic means unless reasonable security measures can be established.
- (5) *Fees for document search, review, and duplication; waiver and reduction of fee*—(i) *Definitions*—(A) *Direct costs* means those expenditures which the Council actually incurs in searching for, duplicating, and reviewing documents to respond to a FOIA request.
- (B) *Search* means all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming.
- (C) *Duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audiovisual records, or machine readable records (*e.g.*, magnetic tape or computer disk).

- (D) *Review* means the process of examining documents located in response to a request that is for a commercial use (*see* paragraph (b)(5)(i)(E) of this section) to determine whether any portion of any document located is permitted to be withheld and processing such documents for disclosure.
- (E) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a request falls within this category, the Executive Secretary will determine the use to which a requester will put the records requested and seek additional information as the Executive Secretary deems necessary.
- (F) *Educational institution* means a preschool, an elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.
- (G) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (b)(5)(i)(E) of this section, and which is operated solely for the purposes of conducting scientific research, the results of

which are not intended to promote any particular product or industry.

(H) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph (b)(5)(i)(H), the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the

Council may also consider the past publication record of the requester in making such a determination.

- (ii) *Fees to be charged.* The Council will charge fees that recoup the full allowable direct costs it incurs, except that the charging of search and/or duplication fees is subject to the restrictions of paragraph (b)(5)(ii)(G) of this section. The Council may contract with the private sector to locate, reproduce, and/or disseminate records. Provided, however, that the Council has ensured that the ultimate cost to the requester is no greater than it would be if the Council performed these tasks. Fees are subject to change as costs change. In no case will the Council contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

- (A) *Manual searches and review.* The Council will charge fees at the following rates for manual searches for and review of records:

- (1) If search/review is done by clerical staff, the hourly rate for GS-7, step 5, plus 16 percent of the rate to cover benefits;

- (2) If search/review is done by professional staff, the hourly rate for GS-13, step 5, plus 16 percent of the rate to cover benefits.

- (B) *Computer searches.* The Council will charge fees at the hourly rate for GS-13, step 5, plus 16 percent of the rate to

cover benefits, plus the hourly cost of operating the computer for computer searches for records.

- (C) *Duplication of records.* (1) The per-page fee for paper copy reproduction of a document is \$.25;
- (2) The fee for records generated by computer is the hourly rate for the computer operator (at GS-7, step 5, plus 16 percent for benefits if clerical staff, and GS-13, step 5, plus 16 percent for benefits if professional staff) plus the cost of materials (computer paper, tapes, disks, labels, etc.).
- (3) If any other method of duplication is used, the Council will charge the actual direct cost of duplicating the records.
- (D) *Hourly rates.* If search, duplication and/or review is provided by personnel of member agencies of the Council, fees will reflect their actual hourly rates, plus 16 percent for benefits.
- (E) *Fees to exceed \$25.* If the Council estimates that duplication and/or search fees are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. In the case of such notification by the Council, the requester will then have the opportunity to confer



with the Council's FOIA Public Liaison with the object of reformulating the request to meet his/her needs at a lower cost.

(F) *Other services.* Complying with requests for special services such as certifying records as true copies or mailing records by express mail is entirely at the discretion of the Council. The Council will recover the full costs of providing such services to the extent it elects to provide them.

(G) *Restriction on assessing fees.* (1) The Council will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(2)(i) If the Council fails to comply with the time limits specified in the FOIA in which to respond to a request, the Council will not charge search fees, or, in the case of a requester described in paragraph (b)(5)(iii)(B) of this section, will not charge duplication fees, except as described in paragraphs (b)(5)(ii)(G)(2)(ii) through (iv) of this section.

(ii) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and the Council provided a timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

- (iii) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and more than 5,000 pages are necessary to respond to the request, the Council may charge search fees, or, in the case of requesters described in paragraph (b)(5)(iii)(B) of this section, may charge duplication fees, if the following steps are taken: The Council provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and The Council discussed with the requester via written mail, e-mail message, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Council may charge all applicable fees incurred in the processing of the request.
- (iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(H) *Waiving or reducing fees.* As part of the initial request for records, a requester may ask that the Council waive or reduce fees if disclosure of the records is in the public interest because

it is likely to contribute significantly to public understanding of the operations or activities of the Council and is not primarily in the commercial interest of the requester. The initial request for records must also state the justification for a waiver or reduction of fees. Determinations as to a waiver or reduction of fees will be made by the Executive Secretary of the Council and the requester will be notified in writing of his/her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph (b)(5)(ii)(H) may be appealed to the Chairman of the Council pursuant to the procedure set forth in paragraph (b)(3)(vi) of this section.

(iii) *Categories of requesters--(A) Commercial use requesters.* The Council will assess fees for commercial use requesters sufficient to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents.

(B) *News media, educational and noncommercial scientific institution requesters.* Requesters who are representatives of the news media, educational and noncommercial scientific institution requesters. The Council shall provide documents to requesters in these categories for the cost of reproduction alone, excluding fees for the first 100 pages.

- (C) *All other requesters.* The Council shall charge requesters who do not fit into any of the categories in paragraphs (b)(5)(iii)(A) and (B) of this section fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without a fee.
- (D) *Description of records.* All requesters must specifically describe records sought.
- (iv) *Interest on unpaid fees.* The Council may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.
- (v) *Fees for unsuccessful search and review.* The Council may assess fees for time spent searching and reviewing, even if it fails to locate the records or if records located are determined to be exempt from disclosure.
- (vi) *Aggregating requests.* A requester(s) may not file multiple requests each seeking portions of a document or documents, solely in order to avoid payment of fees. If this is done, the Council may aggregate any such requests and charge accordingly. In no case will the Council aggregate multiple requests on unrelated subjects from the same requester.

(vii) *Advance payment of fees.* The Council will not require a requester to make an assurance of payment or an advance payment unless:

- (A) The Council estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. The Council will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or
- (B) A requester has previously failed to pay a fee charged in a timely fashion. The Council may require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (b)(5)(iv) of this section or demonstrate that he/she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or a pending request from that requester.
- (C) When the Council acts under paragraph (b)(5)(vii)(A) or (B) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (*i.e.*, 20 working days from receipt of initial requests, plus permissible extensions of these time limits) will begin only after the Council has received the fee payments described.

(6) *Records of another agency.* If a requested record originated with or incorporates the information of another State or Federal agency or department, upon receipt of a request for the record the Council will promptly inform the requester of this circumstance and immediately shall forward the request to the originating agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

Dated: June 26, 2017.

Federal Financial Institutions Examinations Council

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Judith E. Dupre,  
Executive Secretary.

[FR Doc. 2017-13723 Filed: 6/30/2017 8:45 am; Publication Date: 7/3/2017]